of a customer to complete an order, they will obtain such information directly from the customer. (See Paragraph #16 below.)

8. The structure and scope of the program was designed after Pacific Bell held a series of consumer focus groups which identified the following objectives; (i) the program had to be easy to use and easy to understand; (ii) the program must provide a variety of awards, allowing customers to quickly obtain rewards for a lesser number of points or save up for more valuable awards. The focus groups also identified the consumer desire for awards which give discounts off popular consumer merchandise and services, such as travel, rental cars or hotels. This program is like a credit card award program, where members are rewarded for any and all charges appearing on their bill, regardless of the identity of the vendor making the sale. The program participants also represent a range of service and product providers, and are not limited to one industry.

Program Promotion and Enrollment

9. Customers were notified of the Awards program two ways: through a direct mail piece, and through mass media (television and newspaper advertisements). Plaintiffs' declaration attached as exhibits, copies of the print advertisments.

10. Customers receiving the direct mail piece or the newspaper advertisements were given the option to (i) call a toll-free ("800") number to enroll by telephone; (ii) mail in their signed enrollment and consent form, or (iii) fax in their signed enrollment and consent form received with the direct mail piece.

11. The 800 numbers are staffed by outside consultants with experience in operating customer service centers. Customers enroll by giving their telephone account number. Telephone enrollees will receive an enrollment and consent form to sign as part of their initial program

package, referred to as a "welcome kit". All customers must sign an enrollment and consent form prior to redeeming points in the program.

12. All focus groups were conducted by independent contractors. No preliminary (or other) tests were conducted in any focus groups using long distance information derived from Pacific Bell billing records.

13. The Awards program allows customers to earn points even if their long distance provider also includes them in their awards program. The logos or trademarks of all the program participants are prominently displayed on the direct mail piece. No long distance provider is included in this list. The program materials and advertisements do not refer to any long distance service provider, including the Plaintiffs, by name. It therefore is obvious from the program advertising materials that no long distance provider is a program participant in, or otherwise sponsors or endorses the Awards program.

14. The fact that long distance telephone use is rewarded in the program likely encourages customers to increase the use of Plaintiffs' services.

15. The direct flyer states " If you currently receive a separate bill from a long distance company, you may want to ask them about the possibility of combining it with your Pacific Bell bill". I am aware that on May 6, 1996 Plaintiff AT&T announced its intent to issue separate bills to more than one million Pacific Bell customers. I am aware that Plaintiff Sprint offers separate billing to its customers presumably targeting their high revenue customers. I am aware that Plaintiff MCI offers separate billing to its customers, and in fact rewards such separate billing by giving away frequent flyer miles. It is appropriate to inform customers of a competitive billing option offered by Pacific Bell, for which they are able to earn a greater number of Awards points.

16. To date, the Pacific Bell data containing total billed revenue or other usage information pertaining to customers that have enrolled in the Awards program has not been loaded into the Extras database.

17. Customers select a program participant when they wish to redeem Awards points. There is no intent for PB Extras to transfer billing or other data pertaining to an Awards customer's telephone use to its program participants. PB Extras anticipates the need to occasionally confirm an individual's name or address with the program participant for verification purposes only.

The Billing Information Used for the Awards Program does not Distinguish Long Distance Charges.

18. Awards points are accrued based on the total billed amount, as long as the bill exceeds $50. PB Extras only requires the total billed revenue ("TBR") amount to award points.

19. The TBR appearing on a customer's bill includes any Pacific Bell-related installation, inside wiring, or other non-recurring charges. It also includes charges for any telephone usage billed through Pacific Bell, including local and local toll calling, custom calling features, charges billed through Pacific Bell for one of its affiliates such as The Message Center (Pacific Bell Information system's voice mail service ), Pacific Bell Mobile Services (a paging service provider) and calls for any long distance carrier billed to that customer's account also are included.

20. In some cases, customers receive a bill through Pacific Bell for more than one long distance carrier. For example, if a customer subscribes to one long distance carrier, but occasionally a "10XXX" (referred to as a "Carrier Identification Code" or "CIC") is used prior to making a call from their telephone line, charges from more than one long distance carrier will appear on

their bill. Calling card calls and collect calls billed to the selected number but delivered by a carrier other than their selected long distance carrier for that telephone number also will appear on the bill.

21. Customers are able to combine multiple telephone bills with the same billing name but different addresses, or multiple telephone bills with different billing names but the same billing address for the purpose of earning Awards points.

22. Using the TBR amount in the Awards program is not injurious to any competitor, because the information used is blind as to the amount of long distance use or the identity of the long distance carrier.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATE: May 10, 1996

Jan Hewitt

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ORIGINAL
FILED
MAY 10 1996
RICHARD W. WIEKING
CLERK
NORTHERN DISTRICT
OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| AT&T COMMUNICATIONS OF CALIFORNIA, INC., a California corporation, and MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation,<br><br>Plaintiffs,<br><br>vs.<br><br>PACIFIC BELL, a California corporation; PACIFIC TELESIS GROUP, a Nevada corporation; PACIFIC BELL EXTRAS, a California corporation; and PACIFIC BELL COMMUNICATIONS, a California corporation,<br><br>Defendants. | CASE NO. C 96-1691 SBA<br><br>DECLARATION OF LYNNE ELIZONDO IN SUPPORT OF DEFENDANTS PACIFIC BELL, PACIFIC TELESIS GROUP, PACIFIC BELL EXTRAS AND PACIFIC BELL COMMUNICATIONS' OPPOSITION TO AT&T'S, MCI'S AND SPRINT'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER<br><br>DATE: TO BE DETERMINED<br>TIME: TO BE DETERMINED<br>PLACE: JUDGE ARMSTRONG'S COURTROOM |

I, LYNNE ELIZONDO, declare:

1. I am presently employed by Pacific Bell as a Product Manager in the Billing Solutions organization. I make this declaration in support of defendants Pacific Bell, Pacific Telesis Group, Pacific Bell Extras and Pacific Bell Communications' opposition to AT&T's, MCI's and Sprint's

application for a temporary restraining order. I have personal knowledge of the facts stated in this declaration, except those matters stated on information and belief and, if called, could competently testify to them.

2. I have worked in Pacific Bell's third party billing organization for seven years as a product manager. During this time I have been involved with the majority of Pacific Bell's third party billing products and services, including Pacific Bell's message ready billing platform and the development of Pacific Bell's account ready platforms for AT&T, MCI and Sprint. I am also familiar with the process by which Pacific Bell purchases the accounts receivable of third party billing customers and Pacific Bell's collection procedures.

3. In this declaration I will describe the process that Pacific Bell utilizes to provide billing services to third party billing customers, including AT&T, MCI and Sprint.

4. Pacific Bell provides telecommunication services in California for which monthly bills are prepared and mailed to end user customers. These bills identify the Pacific Bell services utilized by the end user customer during the preceding month and the corresponding charges. These charges ("Lump Sum") are totaled on a summary page in the bill. The end user customer then has a specific time period in which to pay this Lump Sum figure. Should the end user customer fail to pay the lump sum in a timely manner, Pacific Bell has the right to take prescribed collection steps up to and including the disconnection of the end user customer's local telephone service and referral of the unpaid balance to a collection entity. The time period for

payment of an end user customer's bill and Pacific Bell's collection options are set forth in Pacific Bell's exchange tariff (Schedule Cal.P.U.C. No. A2) which has been approved by the California Public Utilities Commission ("CPUC").

5. In addition to charges for Pacific Bell's services, Pacific Bell also bills for telecommunication services provided by third parties. The types of telecommunication services that Pacific Bell bills on behalf of third parties are long distance, local toll, faxes, telephone answering, paging, videotex, voice messaging, alarm, value added networks, database companies, electronic data interchange, and electronic mail. The terms under which Pacific Bell provides billing are set forth in billing tariffs (Schedule Cal.P.U.C. No. 175T, Sections 8 and 12) for services originating and terminating within California (e.g., a call from San Francisco to Los Angeles) and in separate agreements between Pacific Bell and the billing customer for services that originate and/or terminate outside of California (e.g., a call from San Francisco to New York).

6. Pacific Bell currently operates two basic billing systems through which charges for third party services are billed. In the account ready environment, Pacific Bell maintains three distinct billing platforms. One each for AT&T, MCI and Sprint. The services are provided by Pacific Bell under customized tariffs for intrastate services and under separate agreements for interstate services. The relevant agreements were correctly referenced by the moving parties in the Declarations of Bruce Banco (¶ 14), Dan Arnett (¶ 2) and Donna Morrison (¶ 14). In summary, these platforms enable Pacific Bell to receive and

process billing data from the three carriers. The carriers send the billing data for an end user customer just once during the month. This occurs several days before the billing date for the specific end user customer. The billing data is sent in a unique format which required the creation of a unique receiving platform for Pacific Bell. Once the data is received and initially processed by Pacific Bell, the charges are funneled into Pacific Bell's established billing stream for placement on the end user customer's bill.

7. The process by which billing data received from the carriers is placed on an integrated Pacific Bell bill is very complex. The following are merely a few of the steps in the process. At the time the billing data is received, Pacific Bell performs control functions and provides related reports to ensure data integrity and to prevent duplicate billing. Pacific Bell then edits the incoming data to ensure compliance with CPUC rules and regulations such as checking for services that are too old to bill and that the dates of the service fall within valid service dates for the end user customer's account (e.g., a charge cannot be for service rendered after the end user customer's responsibility for the service has ceased). In addition, Pacific Bell edits to ensure that data is for a valid working account. The failure of any of these edits causes Pacific Bell to assign specific error codes to the relevant data and to develop reports for use by the involved carrier. The error codes enable the carrier to take corrective action on the rejected data but also to check their own process to avoid ongoing problems. Data that pass Pacific Bell's initial edits are then checked to ensure that

the telephone number the carrier has identified as being correct is in fact the correct billing number for the account. This is necessary because carriers associate their data with the end user customer's working telephone number which may or may not be the actual billing telephone number for the account. Pacific Bell will guide the data, as needed, to the correct billing telephone number.

8. Once the data is guided to the correct billing number, the data is held within the system until it is pulled for placement on the end user customer's bill. The carrier billing data is placed on separate pages in the bill and the total carrier charges are merged with the total charges for Pacific Bell services and the services of any other billing customers into a single aggregate figure representing the Lump Sum due Pacific Bell. Insofar as the Lump Sum is an aggregate of many charges from a variety of sources, it is not possible in my view for anyone receiving the figure to discern the identity of those billing customers whose charges are included, the specific dollar amount of long distance charges, if any, which may be included, or anything else discrete or specific about the components of which the Lump Sum consists.

9. Pacific Bell's billing services are attractive to billing customers for several reasons, one of the most important being that Pacific Bell's collection percentage (e.g., the percentage of billed dollars collected from end user customers) is very competitive with other billing vendors. Pacific Bell's collection results are due in large part to Pacific Bell's ability to deny local telephone service to end user customers who

fail to pay Pacific Bell's Lump Sum figure. It is the inclusion of a billing customer's charges in Pacific Bell's Lump Sum that is important to billing customers. In other words it is of critical importance that the nonpayment of the billing customer's charges be susceptible to the denial of telephone service by Pacific Bell. This can only occur if the billing customer's charges are included in Pacific Bell's Lump Sum. Pacific Bell's billing tariff and billing agreements allow this inclusion because Pacific Bell actually purchases the accounts receivable of its billing customer (e.g., the charges due the billing customer by the end user customer). After the billing data passes the upfront edits described in Paragraph 7, above, Pacific Bell's obligation to purchase the receivable attaches and a payment date and payment amount are calculated. At this point it is Pacific Bell, not the billing customer, who is due payment by the end user customer. Accordingly, the charges associated with the billing customer's services are included in Pacific Bell's Lump Sum figure on the next bill. Pacific Bell collects against the Lump Sum, applies all payments received against the Lump Sum, and monitors payment history against the Lump Sum. Billing customers have no right to know the Lump Sum, are not informed of the figure, and are not informed of the payment history of an end user customer. The Lump Sum figure is known only to Pacific Bell and the end user customer.

10. The second basic billing system that Pacific Bell offers to billing customers is the message ready platform. AT&T, MCI and Sprint all bill through the message ready platform as do the remainder of Pacific's billing customers. The message ready

platform processes the billing data of all billing customers in a similar fashion. Pacific Bell receives billing data for the specific end user customer all through the month rather than immediately preceding the bill date of the end user customer. The functions performed upon receipt of the billing data are similar to those described in Paragraphs 7, 8 and 9, above, but also include the calculation of taxes and surcharges and the investigation of individual charges that are unbillable to determine how the charges might be properly billed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: May 10, 1996.

Lynne Elizondo

LYNNE ELIZONDO

FILED

MAY 15 1996

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| AT&T COMMUNICATIONS, et al., Plaintiffs, vs. PACIFIC BELL, et al., Defendants. | No. C 96-1691 SBA<br><br>ORDER DENYING APPLICATION FOR TEMPORARY RESTRAINING ORDER AND SETTING BRIEFING SCHEDULE FOR PRELIMINARY INJUNCTION |

Plaintiffs have filed an application for Temporary Restraining Order ("TRO") and request for an order to show cause regarding a preliminary injunction.

Federal Rule of Civil Procedure 65(b) provides the district court with the authority to enter a TRO. The Court may grant such injunctive relief where the movant demonstrates either "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [its] favor." Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991).

The Court has considered the papers submitted in connection with this TRO request, including an opposition by the defendants, and plaintiffs' reply. The Court finds that plaintiffs have not demonstrated that the extraordinary remedy of a TRO is warranted. The Court finds that while plaintiffs

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have demonstrated that defendants' conduct may subject them to some injury, they have not demonstrated that the injury is imminent or presently occurring. Plaintiffs' arguments focus on their belief that defendants intend to provide information to an affiliate of defendants who will, in the future, be competing with plaintiffs. Plaintiffs have not, however, made any showing that this conduct is imminent. Nor have plaintiffs made an adequate showing that the alleged injuries are irreparable.

Further, plaintiffs have not demonstrated a likelihood of success on the merits. Many of the issues in this case involve first impression interpretations of the Telecommunications Act of 1996, 42 U.S.C. § 222. Nor have plaintiffs demonstrated that the balance of hardships favors granting a TRO.

The Court therefore finds that a TRO is not warranted. Instead, the Court will set a briefing schedule for a hearing on plaintiffs' request for a preliminary injunction, in order to allow the parties to fully brief the request for injunctive relief pending resolution of this action. Accordingly,

IT IS HEREBY ORDERED THAT the plaintiffs' application for a TRO is DENIED.

IT IS FURTHER ORDERED THAT a hearing on plaintiffs' motion for preliminary injunction shall be held on July 2, 1996.

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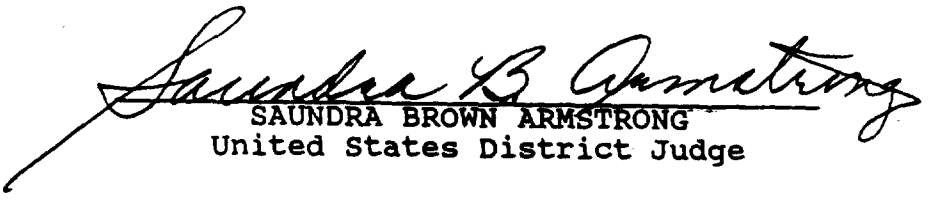
IT IS FURTHER ORDERED THAT plaintiffs shall file and serve a memorandum of points and authorities in support of their request for a preliminary injunction by no later than May 28, 1996.

IT IS FURTHER ORDERED THAT defendants shall file and serve their opposition by no later than June 18, 1996.

IT IS FURTHER ORDERED THAT plaintiffs shall file and serve their reply by no later than June 25, 1996.

IT IS SO ORDERED.

Dated: May 14, 1996



SAUNDRA BROWN ARMSTRONG
United States District Judge

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MAY 24 1996

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| AT&T COMMUNICATIONS OF CALIFORNIA, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>PACIFIC BELL, et al.,<br><br>Defendants. | **CONSOLIDATED ACTION**<br><br>No. C 96-1291 SBA<br><br>**ORDER GRANTING IN PART PLAINTIFFS' EX PARTE MOTION AND REFERRING DISCOVERY DISPUTES TO MAGISTRATE** |

This matter is before the Court on plaintiffs' ex parte application for an order permitting expedited discovery. The Court having read and considered the papers submitted in connection with this matter, and being fully informed,

IT IS HEREBY ORDERED THAT the deadline previously set for plaintiffs' filing of a memorandum of points and authorities in support of their application for a preliminary injunction is CONTINUED to June 4, 1996. ALL OTHER DATES SET BY THE COURT'S PRIOR ORDERS REMAIN IN EFFECT.

IT IS FURTHER ORDERED THAT all discovery disputes in this action are REFERRED to Magistrate Judge Maria-Elena James.

IT IS SO ORDERED.

DATED: May 24, 1996

SAUNDRA BROWN ARMSTRONG
United States District Judge

COPY

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MAY 23 1996
RICHARD W. WIEKING
CLERK
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

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| AT&T COMMUNICATIONS and MCI TELECOMMUNICATIONS,<br><br>Plaintiffs,<br><br>vs.<br><br>PACIFIC BELL, et al.,<br><br>Defendants. | No. C 96-1691 SBA<br>No. C 96-1692 SBA<br><br>DEFENDANTS' OPPOSITION TO PLAINTIFFS' NOTICE AND EX PARTE APPLICATION FOR EXPEDITED DISCOVERY AND MODIFICATION OF THE COURT'S BRIEFING ORDER |
| SPRINT COMMUNICATIONS,<br><br>Plaintiff,<br><br>vs.<br><br>PACIFIC BELL, et al.,<br><br>Defendants. | DATE: To Be Determined<br><br>TIME: To Be Determined<br><br>PLACE: Judge Armstrong's Courtroom |

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## I. INTRODUCTION AND SUMMARY

On Tuesday, May 21, 1996, plaintiffs ATT, MCI and Sprint filed an ex parte joint application for emergency discovery. Plaintiffs seek up to ten emergency depositions, unspecified documents, special subpoena authority to compel document production within 24 hours, on-call access to a Magistrate Judge to instantly address any discovery disagreements, and modifications to the Court's briefing order of May 15, which would take away preparation time from the defendants in order to accommodate the proposed discovery. Such special treatment is solely to facilitate the plaintiffs' fishing expedition for evidence to support their pending preliminary injunction motions.

The defendants strenuously oppose the plaintiffs' request for the expedited discovery because:

(1) "Urgent need" is the standard to be met for obtaining emergency discovery. Written statements by the plaintiffs -- in addition to the Court's TRO denial findings -- show that they have no "urgent need;" and certain of their tactics strongly suggest that pure gamesmanship is driving the discovery requests;

(2) Just last week, the Court ruled that all three plaintiffs had failed to show: (a) any imminent threat of harm; (b) any irreparable injuries; (c) any likelihood of success on the merits; or (d) that the balance of hardships warrants emergency relief. A copy of the Court's decision, filed May 15, 1996, is appended hereto as Exhibit A ["Order Denying Application for Temporary Restraining Order and Setting Briefing Schedule for Preliminary Injunction"]. The requests for emergency discovery, if granted, would eviscerate the rationale for denial of the

TRO's[1]; and

(3) Plaintiffs make a glaring concession by acknowledging that they need the discovery just to search for evidence for preliminary injunctions -- i.e., they do not have evidence warranting preliminary injunctions. The existence or nonexistence of the sort of evidence which the plaintiffs now seek reasonably should have been verified by pre-complaint due diligence before the plaintiffs rushed off seeking TRO's and injunction requests. They should now withdraw their preliminary injunctions and the case should proceed in accordance with normal procedural rules.

## II. FACTS PERTAINING TO ATT's, MCI's and SPRINT's EXPEDITED DISCOVERY MOTIONS[2]

Pacific Bell provides local telephone exchange service and multiple other telephony services within parts of California. The plaintiffs provide long distance telephone service as well as other telephony services within California and elsewhere, including to Pacific Bell's local exchange customers. Pacific Telesis Group is Pacific Bell's holding company. Defendants Pacific Bell Extras and Pacific Bell Communications are wholly-

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[1] As the above caption reflects, the three plaintiffs filed two cases, which received successive court docket numbers -- the early number being assigned to Judge Armstrong, the later to Judge Smith. Similar TRO applications were filed on behalf of each plaintiff in both actions. Judge Armstrong denied all of the applications -- issuing two decisions -- which were identically-worded, save for the captions and related clerical detail. By order filed May 15, simultaneously with the issuance of the TRO rulings, Judge Armstrong directed the litigants to show cause by May 24 why the two actions should not be consolidated.

[2] A more complete statement of the facts regarding the background to this matter is set forth in Pacific's Memorandum of Points & Authorities filed May 10, 1996, in opposition to the plaintiffs' TRO applications.

owned corporate subsidiaries of the holding company.

Recently, defendant Pacific Bell Extras introduced a customer loyalty awards program. Any customer is eligible to join. Enrollment is knowing and voluntary. There are no joining fees or monthly charges for participation.

Subject to certain exceptions and refinements, the program is analogous to airline frequent flyer awards programs. Essentially, each month that a customer spends more than $50.00 on his or her total Pacific Bell monthly bill ("total billed revenue" or "TBR"), Pacific Bell Extras will award the customer 10 bonus points for all dollars spent -- i.e., dollars above, below, and at the $50.00 qualifying trigger. The "TBR" is an amount that appears monthly on each customer's bill.

Pacific Bell is not now a long distance provider. However, pursuant to contracts between Pacific Bell and the plaintiff long distance carriers, the plaintiffs' long distance charges and other telephony services to Pacific Bell's customers are included on Pacific Bell's bills.

Plaintiffs object to, among other things, the pending transfer of the lump sum/total billing revenue figures to Pacific Bell Extras for use in the awards program.

On May 15, the Court filed an order denying the plaintiffs' motions for temporary restraining orders [Exhibit A]. On the same date, the Court filed a briefing and hearing schedule for preliminary injunction applications.

## III. ARGUMENT

### A. "URGENT NEED" IS THE LEGAL STANDARD FOR CONDUCTING DISCOVERY PRIOR TO A PRELIMINARY INJUNCTION

The applicable legal standard for obtaining an order permitting expedited or emergency discovery is that the movant must show an "urgent need." See Stanley v. Univ. of So. Cal., 13 F.3d 1313, 1326 (9th Cir. 1994).

The plaintiffs gloss over the "urgent need" prerequisite. Their position is utterly simplistic, that is, that they do not have any evidence now for a preliminary injunction and, therefore, have an "urgent need" or "good cause" to find some right away in order to prepare preliminary injunction papers.[3] (Compare Plaintiffs' Memo of Points and Authorities at page 4, lines 2-24).

It does not seem to occur to the plaintiffs that they instead should drop their preliminary injunction motion, proceed to normal discovery, and either renew their motion later or request a consolidation thereof with a trial on the merits under

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[3] The plaintiffs do not clearly state what they view the applicable standard for emergency discovery to be, but rather, speak of "good cause" for proceeding by an ex parte application and assert that they have an "urgent need." See page 1 (lines 2-8); page 2(lines 9-10), page 3 (lines 10-15),and page 4 (lines 22-24) of the plaintiffs' Notice and Ex Parte Application for Order Permitting Expedited Discovery and Modification of Briefing Schedule Re: Preliminary Injunction Hearing; Memorandum of Points and Authorities in Support Thereof; and Proposed Order, executed May 21, 1996. Clearly, there is an emphatic distinction as to whether there is "good cause" for the procedural step of making an ex parte filing -- versus whether an "urgent need" exists for obtaining emergency discovery. The Ninth Circuit case cited by both the defendants and the plaintiffs, i.e., Stanley v. University of Southern California, 13 F.3d 1313, 1326 (9th Cir. 1994), says nothing different. In view of the Court's TRO denials and scheduling order, the plaintiffs did not have "good cause" for moving ex parte; and, as shown here, they do not come close to satisfying the "urgent need" standard.

F.R.Civ.P. 65(a)(2) -- if they ever find the type of evidence which they now concede they lack. To the contrary, they want special treatment, they want it right now, and they want the Court to compel the defense to give it to them on an essentially forthwith schedule.

The plaintiffs also argue that the defendants are somehow trying to"... have it both ways" by accusing the plaintiffs of making speculative arguments while objecting to expedited discovery (see Plaintiffs' Memo of Points & Authorities at page 4 (lines 13-15). That argument is all bootstrap. Litigants requesting extraordinary relief are supposed to come to Court armed with a reasonable factual basis therefor -- not expect everyone to appease their bullying behavior. No one is able to deny discovery; but in the absence of any demonstrable need for the furious rush proposed by the plaintiffs, it should be done pursuant to the discovery rules which apply to the rest of the world.

B. THE COURT'S DENIAL OF PLAINTIFFS' TRO APPLICATIONS LAST WEEK EFFECTIVELY REJECTED THE PLAINTIFFS' RENEWED, CONCLUSORY ASSERTIONS OF URGENCY. PLAINTIFFS HAVE PRESENTED NO NEW INFORMATION TO WARRANT EMERGENCY DISCOVERY AND SPECIAL SUBPOENA POWERS.

(1) The Significance of the Recent TRO Denials and the Court's Current Briefing Order.

The Court's rulings of last week against the plaintiffs' TRO requests followed exhaustive briefing by each of the three corporate plaintiffs. In support of their TRO motions, the plaintiffs filed a combined total of nine sworn declarations and several inches of substantive papers. Their simultaneous complaint filings and TRO applications reflected coordinated

timing, strategy and briefing. As initiators of the lawsuits, they had as much time as they deemed necessary to craft, refine and burnish their arguments and declarations for TRO's and preliminary injunctions. They got their day in Court on their initial cries of "emergency." The Court disagreed with them. Now, the plaintiffs are special pleading before the defendants have had the opportunity to prepare answers, consider possible counterclaims, analyze the multiple issues of first impression in the lawsuits, and otherwise proceed with their due diligence respecting such subjects. However, they offer no new information whatever as to why the Court's original assessment may be incorrect.

Inexorably, the plaintiffs' applications for premature discovery concede the following: If they think they need discovery from the parties sued before the preliminary injunction motions are briefed and heard -- then, even in their own minds -- they do not have evidence warranting preliminary injunctive relief. In addition, nothing in their motion papers is proffered for support of the wholly conclusory assertions that any such evidence exists.

Under these circumstances, it is clear that granting accelerated discovery to the plaintiffs soon after the denial of the plaintiffs' TRO applications, would:

(a) undermine the TRO rulings and the findings therein, namely, that neither imminent harm nor irreparable damage is threatened, likelihood of plaintiffs' success on the merits has not been shown and no hardships to the plaintiffs have been demonstrated; and

(b) strip the defendants, and defense counsel, of much of their rightful preparation time during this important early phase of the lawsuit, for the sole purpose of helping AT&T, MCI and Sprint fish for evidence they presumably should already have.

(2) The Request for Extraordinary Subpoena Powers

Moreover, a particularly disturbing feature of the ex parte discovery applications is the request for special subpoena powers which the plaintiffs' casually tucked into their Notice and Ex Parte Application ... and Proposed Order.[4] Each of the three corporate plaintiffs wishes to be specially-empowered to compel production within 24 hours of any document they wish. Since there are only 8 or so regular working hours within any 24-hour period for the employees who would have knowledge of the location of documents, the plaintiffs are really asking for an 8-hour turnaround period -- with no allowances for weekends or holidays, both of which will occur within the time frame at issue.

Amazingly, the plaintiffs proffer not one word of justification or explanation for such an overbearing subpoena-empowerment request and the implicit threats of civil and criminal contempt proceedings and preclusion orders related to subpoenas. It is probably rare that even grand jury subpoenas in criminal cases demand such fast turnaround time. The plaintiffs' request for the special subpoena powers is an especially self-indulgent request which simply should not be entertained.

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[4] See Plaintiffs' Notice and Ex Parte [Discovery] Application ... at page 2 (lines 14-15) and plaintiffs' related [Proposed] Order at page 1 (lines 13-15).